Leading Wherever They Want? CSR, ESG and Directors' Duties

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Abstract: The role of 'public' corporations, i.e., corporations listed on stock exchanges and held by a broad range of individual and institutions shareholders, as promoters of the interest of stakeholders has been debated intensively in recent years. Of late, the focus of the debate has been expanded, and covers no longer only the social responsibility of firms ("corporate social responsibility", or "CSR"), but also – and in particular – the role of corporations for the protection of the environment and global climate (discussed under the broader concept of "ESG", for "environmental – social – governance"). The paper examines these trends and their implications for the legal duties of corporate directors against a theoretical and comparative background. It finds that positive, prescriptive obligations to cater for stakeholder interest are inconsistent with both corporate law systems traditionally following the shareholder value doctrine and those allowing for a greater role of stakeholder concerns to be addressed in corporate decision-making. It also presents a critical analysis of the regulatory policy followed in the EU, arguing that neither the current nor the incoming framework provides a clear-cut, coherent set of specific obligations but leave a wide margin of discretion and, thus, facilitate manipulative, evasive strategies instead.

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I. INTRODUCTION

The global trend towards incentivizing corporations (and their directors) to integrate social and environmental concerns in their business operations and in their interaction with stakeholders[1] clearly has the potential to trigger far-reaching ramifications for the legal position of corporate directors vis-à-vis their company (and, indeed, its shareholders). Some jurisdictions have long recognized a (limited) right of corporate directors to take into account, and cater for, stakeholder interests when exercising their business judgment, whereas others have followed a strict concept of shareholder orientation. While fundamental differences continue to exist in principle, converging standards relating, in particular, to reporting practices on corporate social responsibility (CSR) and environmental, social and governance (ESG) issues appear to have been closing the conceptual gap between jurisdictions on both sides of the Atlantic.[2] Notably, the range of relevant stakeholders, across

[1] To quote the definition developed in European Commission, 'Green Paper: Promoting a European framework for Corporate Social Responsibility' (18 July 2001), COM(2001), 366 final, at para. 20: 'Most definitions of corporate social responsibility describe it as a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis.'

[2] Despite (or perhaps because of) an abundant literature, the exact meaning of, and delineation between, the concepts of "corporate purpose", "corporate social responsibility" and "environmental, social and governance" issues ("ESG") still remains somewhat obscure. At the same time, the question whether – and if so, to what extent – stakeholder considerations can and should be accepted to be integral in the economic and societal functions of corporations clearly is a common denominator. Given the present paper's focus on practical consequences in terms of directors' duties, not on the ideological and doctrinal foundations, the concepts will therefore be treated – admittedly in gross simplification – not as identical, but still as emanations of essentially similar approaches to the (re-)interpretation of fundamental principles of corporate law and corporate governance: approaches that may aptly be referred to as taking a "stakeholderist" (as opposed to shareholder-oriented) view of public corporations. Cf. Robert Eccles, Colin Mayer and Judith Stroehle, 'The Difference Between Purpose and Sustainability (aka ESG)', Harvard Law School Forum on Corporate Governance (20 August 2021), available at https://corpgov.law.harvard.edu/2021/08/20/the-difference-between-purpose-and-sustainability-aka-esg. For the origins of the broader concept of ESG, cf. UN Global Compact, 'Who Cares Wins: Connecting Financial Markets to a Changing World – Recommendations to better integrate environmental, social and governance issues in financial analysis, asset management and securities brokerage Recommendations by the financial industry to better integrate environmental, social and governance issues in analysis, asset management and securities brokerage' (2004), available at https://www.unepfi.org/fileadmin/events/2004/stocks/who_cares_wins_global_compact_2004.pdf. By contrast, the term CSR has a much longer tradition and can be traced back to the 1950s, cf. Howard R. Bowen, *Social Responsibilities of the Businessman* (Iowa City: University of Iowa Press, 1953). For further discussion, cf., e.g., Archie B. Carroll, 'A History of Corporate Social Responsibility: Concepts and Practices', in: Andrew Crane et al. (eds.), *The Oxford Handbook of Corporate Social Responsibility* (Oxford: Oxford University Press, 2008), 19; Klaus J. Hopt, 'Corporate Purpose and Stakeholder Value - Historical, Economic and Comparative Law Remarks on the Current Debate, Legislative Options and Enforcement Problems', ecgi Law Working Paper 690/2023 (March 2023), available at https://ssrn.com/abstract=4390119, at 4-7 and 8-11; Domènec Melé, 'Corporate Social Responsibility Theories', ibid., 47; Wolf-Georg Ringe, 'Investor-led Sustainability in Corporate Governance', Annals of Corporate Governance 7:2 (2022), 2, at 7-13; Mark J. Roe, 'Corporate Purpose and Corporate Competition', Wash. U. L. Rev. 99 (2021), 223, at 232-6. Specifically on the concept(s) of corporate purpose, cf., e.g., Jill E. Fisch and Steven Davidoff Solomon, 'Should Corporations Have a Purpose?', Texas L. Rev. 99 (2021), 1309; Elizabeth Pollman, 'The History and Revival of the Corporate Purpose Clause', Texas L. Rev. 99 (2021), 1423; Holger Spamann and Jacob Fisher, 'Corporate Purpose: Theoretical and Empirical Foundations/Confusions', ecgi Law Working Paper 664/2022, available at

all dimensions of the debate, goes far beyond traditional interpretations of that term (and, indeed, of whose interests may have to be protected by law): While traditional concepts, by and large, would have been confined to a corporation's creditors and workforce, relevant stakeholder groups, for the purposes of the current debate, include essentially all individuals (even remotely) affected by the impact of the corporation's commercial activities, irrespective of the legal nature of that relationship. Within the European Union, recent legislative initiatives will reinforce a trend towards indirect regulation of corporate behaviour in the interest of stakeholders – and come with additional duties for corporate directors in this regard. In the US, by contrast, the legislator or, indeed, regulatory bodies have so far refrained from imposing specific ESG-related obligations on corporations and their boards,[3] while the draft *Restatement of the Law, Corporate Governance*, expressly recognises the legality of the inclusion of specific stakeholder concerns in corporate decisions to a limited extent, but no positive obligations in that regard.[4]

From a European perspective, in view of a steadily growing body of relevant laws and regulations, it is certainly tempting to interpret what has been aptly termed "stakeholderism"[5] – claims promoting an increasing role of stakeholder interests in the formation of business decisions in a broad sense, including positive obligations of corporate directors to that effect – as a *regulatory* trend, reflecting a number of complex policy movements that have been triggered and promoted by influential stakeholder groups, prominent academics, and, ultimately, implemented and enforced by the European legislator responding to public and academic pressure. To be sure, it has been insisted that the responsibility of corporations for the protection of stakeholder interests is, and should be, to a large extent a *voluntary* matter, driven, not least, by the insight that greater awareness for stakeholder interests not just contributes to the public good, but also creates more beneficial investment and business environments that would ultimately enhance also the

http://ssrn.com/abstract_id=4269517. The concept of "corporate purpose" as catchword for a broader stakeholder orientation has been promoted, in particular, by Colin Mayer, see id., *Prosperity: Better business makes the greater good* (Oxford: Oxford University Press, 2018); id., 'The Future of the Corporation and the Economics of Purpose', J. Mgt. Stud. 53 (2021), 887; id., 'What is Wrong with Corporate Law? The Purpose of Law and the Law of Purpose', ecgi Law Working Paper 649/2022, available at http://ssrn.com/abstract_id=4136836. For a useful, albeit already outdated survey of the abundant literature, see Deborah Burand and Anne Tucker, 'Legal Literature Review of Social Entrepreneurship and Impact Investing (2007-2017): Doing Good By Doing Business', Wm. & Mary Bus. L. Rev. 11 (2019), 1.

[3] To be sure, on June 2022, the Securities Exchange Commission (SEC) published proposed amendments to its rules under the Securities Act of 1933 and the Securities Exchange Act of 1934 requiring corporations to provide certain climate-related information in their registration statements and annual reports (see https://www.sec.gov/rules/proposed/2022/33-11042.pdf). Following a host of controversial comments on this proposal, however (available at https://www.sec.gov/comments/s7-10-22/s71022.htm), no follow-up has been published as yet. For a critical analysis of that move, see, e.g., Paul G. Mahoney and Julia D. Mahoney, 'The New Separation of Ownership and Control: Institutional Investors and ESG', Col. Bus. L. Rev. (2021), 841.

[4] See, for a detailed analysis, American Law Institute (ALI), 'Restatement of the Law, Corporate Governance – Tentative Draft No. 1' (April 2022), pp. 25-58.

[5] E.g., Lucian A. Bebchuk and Roberto Tallarita, 'The Illusory Promise of Stakeholder Governance', Cornell L. Rev. 91 (2020), 106.

individual prosperity of each particular firm.[6] At the same time, it is evident that particularly the European Union has been asserting its ambition to reinforce (perceived) market trends to that effect through public regulation, whose potential – particularly where coupled with effective sanctions – as a source of new obligations that may result in substantial changes to residual incentive structures of corporate directors can hardly be overestimated.

Indeed, awareness of the broader societal implications of corporate behaviour has, for a long time already, translated into demand for "sustainable" products and investment opportunities on the part of consumers and private investors irrespective of the existence of applicable laws and regulations, and independently from their emergence. As evidenced, for example, by a host of providers of ESG ratings (applying a vast range of highly diverse criteria),[7] but also by a growing number of industry-driven standards in the field, the growing influence of "stakeholderism" certainly has resulted from market pressure (through direct or indirect, collective investment) as well as from legal and/or regulatory influence[8] – and can thus be interpreted *both* as a "bottom-up" phenomenon *and* as "top-down" regulation. Likewise, the most prominent expression by corporate directors in support of stakeholder orientation published so far – the 2019 (re)Statement on the Purpose of a Corporation issued by the "Business Roundtable" (an association of chief executive officers of major US companies)[9] – can be perceived as a reaction to market pressure. This holds true irrespective of whether that statement should be interpreted as reflecting a genuine commitment to an increased protection of stakeholder interests[10] – or rather as an inconsequential public-relations statement, intended to 'deflect regulatory pressure (on environmental, labor, privacy, and other pressing issues) by introducing hopes that corporations would address concerns about stakeholders on their own without the need for government intervention',[11]

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[6] Cf., characteristically, European Commission, *supra* n. 1, para. 21: 'Being socially responsible means not only fulfilling legal expectations, but also going beyond compliance and investing "more" into human capital, the environment and the relations with stakeholders. The experience with investment in environmentally responsible technologies and business practice suggests that going beyond legal compliance can contribute to a company's competitiveness. Going beyond basic legal obligations in the social area, e.g. training, working conditions, management-employee relations, can also have a direct impact on productivity. It opens a way of managing change and of reconciling social development with improved competitiveness.'

[7] On ESG ratings, see, e.g., Florian Berg, Julian F. Kölbel and Roberto Rigobon, 'Aggregate Confusion: The Divergence of ESG Ratings', Rev. Fin. (2022), 1315; Monica Billio et al., 'Inside ESG Ratings: (Dis)agreement and performance', Corp. Soc. Responsib. Environm. Manag 28 (2021), 1426.

[8] For examples, cf., e.g., Virginia Harper Ho and Stephen Kim Park, 'ESG Disclosure in Comparative Perspective: Optimizing Private Ordering in Public Reporting', U. Pa. J. Int'l L. 41 (2019), 249, at 293-4; Mahoney and Mahoney, *supra* n. 3, at 842-54.

[9] Business Roundtable, 'Statement on the Purpose of a Corporation', available at https://s3.amazonaws.com/brt.org/May-2022BRTStatementonthePurposeofaCorporationwithSignatures.pdf (19 August 2019).

[10] Cf., e.g., reviewing initial press coverage and the subsequent discussion, Lucian A. Bebchuk and R. Tallarita, 'Will Corporations Deliver Value to All Stakeholders?', Vand. L. Rev. 75 (2022), 1031, at 1034-35. See also Edward B. Rock, 'For Whom Is the Corporation Managed in 2020? The Debate over Corporate Purpose', Bus. Law. 76 (2021), 363, at 364-7.

[11] Ibid., at 1042.

ultimately serving the private interests of corporate directors and reducing shareholder control.[12] And it holds true irrespective of whether or not investor-driven initiatives promoting increased protection of stakeholder interests have actually been effective.[13]

Given the intensity of the debate, the sheer number and the diversity of actors involved, and the dynamic evolution of relevant standards and performance criteria by supranational organisations, international standard-setters as well as by industry and investor organizations, it is, at the same time, striking and hardly surprising that the results, as far as their implications for the legal position of corporate directors are concerned, remain rather obscure. Both from an investors' perspective *and* measured against public policy objectives, a host of empirical studies[14] appear to suggest that, for all the seemingly consistent support of stakeholder-orientation as a guiding principle of modern corporate governance and market-based investment, the causal link between adherence to relevant standards (whatever they may be) and the outcome in terms of both relevant stakeholder interests and the profitability of firms remains obscure. From a directors' perspective, this has resulted in growing uncertainty as to the implications in terms of the overall orientation of their obligations vis-à-vis firms and shareholders. Essentially, this uncertainty boils down to four interrelated questions: Is it within the powers of corporate directors to cater for stakeholder interests in their business decisions? If so – what are the limits? And are there any *positive* obligations in this regard? Above all – have market trends and/or new regulatory requirements changed the traditional orientation of (fiduciary) duties of corporate directors to their firms?

Against this backdrop, the present paper, focusing on listed (publicly held) companies, contributes to the emerging academic debate on the purpose of corporations and directors' duties in the light of a growing body of CSR- and ESG-related obligations in two fundamental respects: *First*, reviewing that debate in the

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12 Ibid. And see Bebchuk and Tallarita, *supra* n. 5; Bebchuk and Tallarita, 'The Perils and Questionable Promise of ESG-Based Compensation', J. Corp. L. 48 (2022), 37, at 42 -3.

13 For sceptical assessments in this regard, cf., e.g., Paul Brest, Ronald J. Gilson and Mark A. Wolfson, 'How Investors Can (and Can't) Create Social Value', J. Corp. L. 44 (2018), 205; Jonathan R. Macey, 'ESG Investing: Why Here? Why Now?', Berkeley Bus. L. J. 19 (2022), 258. For a decidedly more optimistic view, cf. Ringe, *supra* n. 2; and see Marco Becht, Anete Pajuste and Anna Toniolo, 'Voice Through Divestment', ecgi Finance Working Paper 900/2023, available at https://ssrn.com/abstract=4386469 (arguing that the divestment movement in relation to producers of fossil fuels actually *has* had a visible impact on relevant stock prices). Specifically on the impact of institutional investors in this regard, cf. Alexander Dyck et al., 'Do institutional investors drive corporate social responsibility? International evidence', J. Fin. Econ. 131 (2019), 693.

14 Reflecting the intensity of the debate and the wide-spread support of stakeholder orientation in international fora, empirical studies addressing a wide range of assumptions and implications count by the hundreds. Results so far have been controversial and inconclusive. For examples, cf., e.g., Christina E. Bannier, Yannick Bofinger and Björn Rock, 'Doing Safe by Doing Good: ESG Investing and Corporate Social Responsibility in the U.S. and Europe', Eur. Acc. Rev. 32 (2023, forthcoming in print; available online); Philipp Krüger, 'Corporate Goodness and Shareholder Wealth', J. Fin. Econ. 115 (2015), 304; Allen Ferrell, Hao Liang and Luc Renneboog, 'Socially Responsible Firms', J. Fin. Econ. 122 (2016), 585; and cf., reviewing the available empirical literature, Hans B. Christensen, Luzi Hail and Christian Leuz, 'Mandatory CSR and sustainability reporting: economic analysis and literature review', Rev. Acc. Stud. 26 (2021), 1176; Gunnar Friede, Timo Busch and Alexander Bassen, 'ESG and financial performance: aggregated evidence from more than 2000 empirical studies', J. Sust. Fin. & Investment 5 (2015), 210.

light of the established controversy on the role of stakeholder interests in corporate governance more generally, it seeks to explore the dimension of potential implications on existing concepts of directors' duties. *Secondly*, it examines how corporate directors, facing both existing and incoming regulatory requirements on the one hand and market pressure demanding increasing commitment to stakeholder concerns on the other hand, can be expected to respond, including by exploiting their discretionary powers through active participation in self-regulatory initiatives, in order to influence the interpretation of obligations they are expected to comply with. In this regard, the paper critically examines the role of self-regulation and its potential to provide remedies to the residual uncertainties as to the legal position of corporate directors in an environment characterized by growing stakeholder orientation. It argues that, while self-regulatory initiatives on the part of market participants could, in principle, prove more effective than regulatory initiatives driven by national legislators and supra-national standard setters, their impact on both the economic performance of corporations and the protection of stakeholder interests could nonetheless be problematic, in view of potential difficulties to define and delineate the boundaries of "sustainable" corporate behaviour – and in view of residual incentives to misuse the power of self-regulation for self-serving motives. The paper thus ties in with a prominent critique of "stakeholderism" in corporate law as inadequate and, indeed, potentially outright counterproductive.[15]

All in all, the paper thus seeks to help improve understanding of (a) the substantive content of new stakeholder-oriented directors' duties (if any) in the light of established principles of corporate law, and (b) potential implications for the constitutional balance between shareholders and management of public corporations and the associated incentive structure of corporate directors. Throughout the paper, the perspective is predominantly a European one: focusing on European regulatory trends and their implications on the constitutions of European companies, while the broader international context and comparative outlook on the situation in US law will be addressed where appropriate.

The remainder of the paper is organized as follows: In order to prepare the ground for the subsequent legal analysis of the European regulatory framework, section II below recounts the historic evolution of shareholder orientation and stakeholder orientation as diverging paradigms for the interpretation and execution of corporate directors in different legal systems. As directors' duties, in the changing environment of increasing stakeholder orientation, are shaped by a dynamic interplay between established fundamental principles, an ever-growing number of relevant international standards, their implementation by national and (within Europe) supra-national legislators and, last not least, market forces, section III then turns to an analysis of how exactly relevant norms and standards should be expected

[15] Cf., for some of the most prominent critiques so far, Lucian A. Bebchuk and Roberto Tallarita, *supra* n. 5; Bebchuk and Tallarita, *supra* n. 10.

to work. On this basis, section IV then discusses how corporate directors, in view of the regulatory framework and the incentive structure associated with it, may be expected to respond. Section V concludes.

II. STAKEHOLDERISM VS. SHAREHOLDERISM: THE BACKDROP IN TRADITIONAL CORPORATE LAW DOCTRINE

1. NEW STAKEHOLDERISM AND ESTABLISHED PRINCIPLES OF CORPORATE GOVERNANCE: WHERE ARE THE DIFFERENCES? AND: WHAT IS ACTUALLY NEW?

Whether conceived of as a market-driven phenomenon, triggered and fuelled by widespread concerns about the environmental and social implications of business activities among consumers and investors, or, alternatively, as a regulatory trend, the impact and implications of "stakeholderism" within the meaning roughly defined above, cannot be assessed without taking into account the broader legal environment and, in particular, doctrinal differences in terms of the orientation of directors' duties across different jurisdictions. Over time, jurisdictions have developed diverging concepts of the fundamental objectives to be pursued in corporate decisions. At first sight, the claim that corporate directors are – or should be – required to take into account and, indeed, protect stakeholder interests when exercising their business judgment will be perceived to be more controversial within the context of a corporate law framework that traditionally adheres to strict shareholder orientation than within a setting where the protection of stakeholder interests has been recognised as part of the responsibilities of corporate directors.

On closer inspection, however, the traditional conceptual approaches appear to differ gradually rather than fundamentally, and their implications for the assessment of CSR- or ESG-related policies and business decisions may therefore be less dramatic than would appear at first sight. To be sure, the growing influence of "stakeholderism", in particular following the 2019 statement of the Business Roundtable,[16] has been perceived as a deviation from the fundamental principle of shareholder orientation long established in the majority of US corporate laws and mainstream US corporate law doctrine.[17] At the same time, it has been pointed out that the doctrine of strict shareholder supremacy, while widely recognised in corporate law theory, has been contested repeatedly ever since the seminal debate on the fundamental nature of directors' duties between Professors Merrick Dodd

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[16] *Supra* n. 9 and accompanying text.

[17] See, again, *supra* n. 10 and accompanying text. And cf., for the majority view advocating strict shareholder orientation, e.g., Frank H. Easterbrook and Daniel Fischel, *The Economic Structure of Corporate Law* (Cambridge, MA: Harvard University Press), at 37-8. But see, for a broader restatement from a comparative perspective, also John Armour et al., 'What Is Corporate Law?', in: Reinier Kraakman et al. (eds.), *The Anatomy of Corporate Law* (Oxford: Oxford University Press, 3rd ed., 2017), p. 1, at pp. 22-24.

and Adolph Berle in the early 1930s.[18] Moreover, it has been argued that US case law reality, applying state corporation laws generally respecting a substantial margin of appreciation under the different emanations of the "business judgment rule", appears *not* to have followed an overly restrictive concept of shareholder orientation, and *not* to prohibit outright a broader interpretation of directors' duties that would include the recognition of stakeholder implications of business decisions.[19] By contrast, even jurisdictions where corporate directors are *not* subject to a formal standard of shareholder wealth maximization tend to uphold the notion that the economic welfare of the company should be the guiding objective to be pursued in all business decisions, and that the protection of stakeholder interests is permissible only if and to the extent compatible with that fundamental objective.[20]

If the rough sketch developed before holds true, different jurisdictions, while adhering to different conceptual interpretations of the fundamental orientation of directors' duties, can be said to reach not entirely dissimilar results when evaluating business decisions taken with stakeholders' interests in mind: Irrespective of the doctrinal gap between stakeholder and shareholder orientation as guiding principles, the pursuit of stakeholder interests by corporate directors, arguably, can be said to be consistent with established standards of corporate law if (and only if) *and* to the extent that it does respect the ultimate supremacy of the profitability of the company (and, thus, the investors' interest in maximizing their returns), which must not be jeopardised even in systems allowing for broader stakeholder orientation.[21]

Seen in this light, the true difference between shareholder and stakeholder orientation in terms of evaluating stakeholder-oriented business decisions may be found in different *modes of operationalization* rather than in different normative outcomes (that is to say: different substantive standards as to whether stakeholder concerns may motivate business decisions): Taking shareholder-oriented US corporate laws, as they have emerged since the 1930s, as an example, it appears that,

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[18] See, on the one hand, Adolf A. Berle, 'Corporate Powers As Powers in Trust', 44 Harv. L. Rev. 1049 (1931), and id., 'For Whom Corporate Managers *Are* Trustees: A Note', 45 Harv. L. Rev. 1365 (1932) (arguing in support of strict shareholder orientation, the recognition of shareholders as the sole beneficiaries of directors' in the exercise of their fiduciary powers, and, consequently, against broad discretion for directors to cater for stakeholder interests), and, on the other hand, E. Merrick Dodd Jr., 'For Whom Are Corporate Managers Trustees?', 45 Harv. L. Rev. 1145 (1932).

[19] E.g., Lyman Johnson, 'Corporate law and the history of corporate social responsibility', in: Harwell Wells (ed.), *Research Handbook on the History of Corporate and Company Law* (Cheltenham: Edward Elgar, 2018), 570, at pp. 584-5; id., 'Relating Fiduciary Duties to Corporate Personhood and Corporate Purpose', in: D. Gordon Smith and Andrew Gold (eds.), *Research Handbook on Fiduciary Law* (Cheltenham: Edward Elgar, 2016), 260. And see, for an in-depth analysis of the diverse positions adopted by different US jurisdictions in this regard, ALI, *supra* n. 4, at pp. 28-9, 51-8, emphasizing (ibid., p. 52) that "shareholderist" jurisdictions tend to apply a stricter reasonableness test than "stakeholderist" jurisdictions in relation to 'the utilization of corporate resources for public welfare, humanitarian, educational, or philanthropic purposes' rather than prohibiting them outright.

[20] For a good comparative analysis, see, e.g., Carsten Gerner-Beuerle and Michael Schillig, *Comparative Company Law* (Oxford: Oxford University Press, 2019), pp. 249-73. For the divergent positions in US corporate laws, cf., again, ALI, ibid. And see, again, Armour et al., *supra*, n. 17.

[21] For an instructive comparison of stakeholder- and shareholder-oriented jurisdictions in the US with regard to specific decisions, cf., again, ALI, ibid., pp. 31-46.

for all the doctrinal commitment to a strict form of shareholder orientation as a guiding principle, a director determined (for whatever motive) to cater for specific stakeholder interests when making business decisions will not be hindered from doing so other than in exceptional circumstances, where relevant activities do not have positive implications for the corporation at all. This is so because courts will likely accept the argument that such decisions, based on the information available at the relevant time, could reasonably be regarded to be in the long-term interest of the corporation.[22] While applying a shareholder-oriented approach, relevant jurisdictions, in other words, appear to mollify the rigidity of that principle at the operational level, that is, when defining the margin of discretion granted under the business judgment rule. Under this approach, the scope for protection of stakeholder interests might be restricted as a matter of principle, but ultimately will be granted – to some extent, subject to limitations – in the course of operationalization. German corporate law, to use a contrasting example, would be more flexible at the level of doctrinal principle, while restricting excessive discretion at the operational level, *i.e.*, when applying the German adaptation of the business judgment rule:[23] According to the prevailing interpretation of these principles, the substantive content of business decisions remains within the discretion of directors, but the (profitability) interest of the corporation generally prevails.[24]

To be sure, "*normative* outcomes" within the meaning used above (referring to the normative standards by which specific decisions are being measured in legal practice) should not be confused with the substantive *economic* outcomes (referring to the *de facto* orientation of business decisions): Within a system expressly committed to the principle of shareholder supremacy, decisions conceivably may turn out to be geared more towards maximizing immediate financial returns than in a system favouring a broader stakeholder orientation, as business decisions will be oriented along that general principle, even if the standard of judicial review applied to individual business decisions may ultimately be similar in both settings.[25] In other words, even if the standard is relaxed in the course of operationalization in individual lawsuits (by respecting a certain margin of discretion for business judgments generally), requiring directors to adhere to a principle of strict shareholder orientation could result in different incentives – and, indeed, different substantive outcomes – than providing them with a margin of discretion with regard to the balance between shareholder and stakeholder interests in the first place. One

[22] See, for a similar conclusion, Cynthia A. Williams, 'Corporate Social Responsibility and Corporate Governance', in: Jeffrey Gordon and Wolf-Georg Ringe (eds.), *Oxford Handbook of Corporate Law and Governance* (Oxford: Oxford University Press, 2018), 634, at pp. 672-4.

[23] To be found in section 93(1), sentence 2 of the Stock Corporation Act, whereby duties will not be deemed to have been breached in circumstances 'in which the member of the management board, in taking an entrepreneurial decision, was within their rights to reasonably assume that they were acting on the basis of adequate information and in the best interests of the company' (official translation of the Act available at https://www.gesetze-im-internet.de/englisch_aktg/englisch_aktg.html#p0536).

[24] See, generally, reviewing the academic literature and relevant case law, Jens Koch, *Aktiengesetz* (17 ed., 2023), Commentary on § 76 Aktiengesetz (German Stock Corporation Act), at paras. 33-4, 36.

[25] This may, in fact, explain at least part of the controversial policy debate about the shareholder/stakeholder dichotomy in both law and economics.

possible explanation for that assumption could be found in the expressive function of the overarching normative objective:[26] Precisely because the shareholder supremacy paradigm could be interpreted as a signal that *any* decision other than one clearly favouring the maximization of shareholder wealth would not be consistent with the overall doctrine, it raises the stakes for the defence, or justification, of decisions whose economic impact cannot, or not easily, be explained as compliant with that objective, while deviations from that it may appear more acceptable under a system where the balance of shareholder and stakeholder interests is left to the discretion of corporate directors in the first place.

Whether or not these assumptions hold true, remains a matter of speculation, of course, and the alternative assumption that the substantive content of business decisions might reflect general societal values rather than applicable normative standards is equally plausible, in which case the formulation of the standard as such – and, indeed, adjustments to that standard – would not matter much. It is perhaps worth noting, in this context, that the introduction of the concept of "enlightened shareholder value" through section 172(1) of the UK Companies Act 2006, marking a doctrinal shift from a more shareholder-oriented paradigm, does not appear to have had a measurable impact in terms of actual substantive outcomes.[27] Against this backdrop, it is probably fair to conclude that the actual relevance of the fundamental doctrinal concept is as difficult to establish empirically as the notion that the application of the doctrine of pure shareholder orientation, in itself, should be condemned as harmful to the public good, as has been argued repeatedly by the advocates of corporate social responsibility and the "corporate purpose" movement.[28] In the absence of a detailed comparison of substantive solutions for specific scenarios (involving, e.g., measures to protect the environment, support of workers' interests beyond working-place safety, support of minority groups, political donations, etc.), which would be outside the scope of the present paper, a reliable assessment of the full dimension of similarities and differences between "shareholderist" and "stakeholderist" jurisdiction is impossible. For present purposes, however, it is sufficient to conclude that neither corporate law systems applying a shareholder supremacy standard nor those allowing for a greater role of

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[26] On the "expressive" function of norms, cf., generally, e.g., Cass R. Sunstein, 'On the Expressive Function of Law', 144 U. Pa. L. Rev. 2021 (1996); Matthew D. Adler, 'Expressive Theories of Law: A Skeptical Overview', 148 U. Pa. L. Rev. 1363 (2000); Elizabeth S. Adler and Richard H. Pildes, 'Expressive Theories of Law: A General Restatement', 148 U. Pa. L. Rev. 1503 (2000); specifically in the context of directors' duties, cf. Jonathan C. Lipson, 'The Expressive Functions of Directors' Duties to Creditors', 12 Stan. J.L. Bus. & Fin. 224 (2007).

[27] See *infra*, II.2.B., nn. 38-39 and accompanying text.

[28] See, e.g., the programmatic book by Lynn Stout, *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations and the Public* (San Francisco: Barrett-Koehler, 2010). And see Mayer, Prosperity *supra* n. 2; Alex Edmans, 'Grow the Pie: How Great Companies Deliver Both Purpose and Profit' (Cambridge: Cambridge University Press, 2020).

stakeholder concerns can be said to prohibit the advancement of stakeholder interests *a limine*.[29]

2. SOME IMPLICATIONS

The foregoing analysis, if correct, arguably holds a number of important implications for present purposes, which may considerably improve our understanding of the issues involved:

A. Explaining the us conundrum: why are stakeholder concerns (apparently) so prominent in a system of strict shareholder orientation?

For a start, the considerations above may help to understand what could be described as the US conundrum, that is, the somewhat puzzling question why even those US jurisdictions which adhere to the principle of strict shareholder orientation, to date, appear to have been rather tolerant of declarations of commitment to the protection of stakeholder interests – as reflected, for example, in the 2019 statement promulgated by the Business Roundtable, but also in countless individual statements on the advancement of stakeholder interests in the operations of public corporations. If the principle of shareholder orientation were as strictly upheld in legal practice as some of its advocates seem to suggest, it would undoubtedly leave no room for the reinterpretation of the corporate purpose as reflected in that prominent display of "stakeholderism," and any director promoting that view might be expected to be reigned in by liability lawsuits before long. At the same time, the above analysis could help to understand why the *actual* impact of such commitments for the relevant stakeholder groups, despite all the fanfare associated with their announcement, appears to have been limited so far:[30] *If* the decision whether and to what extent business decisions should cater for stakeholder interests is left to the discretion of directors, one should not wonder that such discretion also allows directors to fall short of their own commitments to further the public good.

However, while general principles of US corporate laws – irrespective of the respective jurisdiction's fundamental orientation as "shareholderist" or "stakeholderist" – thus appear to *facilitate* the inclusion of stakeholder concerns into corporate decision making, none of the considerations above actually explain *why* stakeholder orientation has come to feature so prominently in contemporary US corporate law debates. In the absence of regulatory requirements to take into account specific stakeholder interests or, at least, disclose information on relevant

[29] In the words of Edward Rock: 'While shareholder primacy is the best description of the (default) legal characteristics of the corporate form, one should not think that the [principle] will decide more than it decides': see Rock, *supra* n. 10, at 375.

[30] According to recent studies, corporations whose CEOs participated in the Business Roundtable's 2019 statement have failed to adopt any changes to existing corporate documents and business models: Lucian A. Bebchuk and Roberto Tallarita, 'Will Corporations Deliver Value to All Stakeholders?', Vand. L. Rev. 75 (2022), 1031; Bebchuk, Kobi Kastiel and Tallarita, 'Stakeholder Capitalism in the Time of COVID', Yale J. on Reg. 40 (2023), 60.

strategies and activities, the increasing trend to cater for such interests – and to promote a reorientation of established standards of conduct in this regard – certainly cannot be explained on the grounds of compliance needs: As laws and regulations do not (yet) provide any specific substantive and/or disclosure obligations relating to CSR or ESG matters, the *failure* to expand the scope of corporate decisions beyond (long-term) profit maximisation certainly would not carry any sanctions by law. Instead, the recent trend towards "stakeholderism", as discussed above,[31] probably has to be interpreted as reflecting a combination of market pressure, exercised, in particular, by activist shareholders, and, perhaps, the desire to *avoid* specific regulation on the part of corporate boards.

Against this backdrop, the current situation in US corporate law debate should be read as evidence that the impact of "stakeholderism" on the actual governance of relevant firms in general, and its implications on directors' duties in particular, cannot meaningfully be assessed without regard to the *general* corporate governance framework established in relevant jurisdictions.[32] In this regard, it is worth noting that specific voting proposals submitted by activist shareholders, advocating environmental and/or social stakeholder interests, appear to have played a significant role as drivers of the debate in publicly held US corporations in recent years.[33] Irrespective of whether or not such initiatives were ultimately successful, their very existence – and thus, the existence of a shareholder voting system which facilitates the submission and promotion of shareholder proposals in the way established in US corporations generally – arguably has been instrumental for the promotion of CSR- or ESG-related matters in recent years, and has played a formative role for the incentive structure of corporate directors as a result. In an environment like this, where "stakeholderism" can be characterised as a "bottom up" phenomenon, the implications of relevant initiatives on the legal position of directors inevitably will look very different from an environment where relevant *positive* obligations are imposed by laws and regulations, not least because directors' liability as a potential sanction will hardly play a role.

B. Understanding the full dimension: what is actually new?

Even more importantly, the findings developed above may be useful in facilitating a better understanding of the full dimension of the recent trend towards enhanced stakeholder orientation generally, particularly in jurisdictions where – like in the European Union – this trend is driven, to a large extent, by mandatory legislation and regulation. If corporate laws world-wide, irrespective of the underlying doctrinal background, have been tolerant of the advancement of stakeholder interests to the extent that such advancement could reasonably be

[31] See *supra* nn. 8-13 and accompanying text.
[32] Cf., for a very general analysis in this respect, also Ann K. Buchholtz, Jill A. Brown and Kareem M. Shabana, 'Corporate Governance and Corporate Social Responsibility', in: Crane, *supra* n. 2, 327, at 334-6.
[33] Cf. sources cited *supra* n. 8.

argued to be broadly consistent with the overarching objective of (long-term) profitability, growing awareness of stakeholder implications of business decisions and corporate behaviour among corporate directors cannot, as such, be interpreted as a deviation from, or in conflict with, established principles. Nor is it inconsistent with such principles if such growing awareness results in specific corporate decisions that would have been hardly conceivable, say, a decade or so ago, always provided that that decision, directly or indirectly, is ultimately motivated by enhancing the profitability of the company in the long term. Relevant examples may include measures to reduce environmental consequences of business activities beyond the absolute minimum, or to improve labour relations beyond mandatory legal requirements, funding programs to protect the interests of specific minority groups, or donations to philanthropic organisations.[34]

A particularly clear-cut case, in this regard, are business decisions motivated by demand-side pressure: Imagine, for example, that the management of a major clothing retailer decides to substitute their existing suppliers in emerging markets, in the face of increased pressure by human rights groups pointing to hazardous working conditions and/or specific requests or complaints by a growing number of customers, and to enter into contracts with other suppliers who produce according to higher standards. The decision to use such more expensive sources, irrespective of its immediate effect on the corporation's revenues, is likely to be upheld also within a system of strict shareholder orientation, as courts would respect the business judgment that such a move ultimately will be in the corporate interest.[35] By contrast, claims that stakeholder concerns should – always or in specific scenarios – prevail over, or rank on par with, the conflicting interest in maximizing the profitability of the corporation clearly are inconsistent both with corporate law systems adhering to the principle of shareholder supremacy *and* with those systems that have traditionally allowed for some discretion to directors to balance shareholder and stakeholder interests already at the normative level.

Against this backdrop, it would be misleading to conclude, as has been suggested,[36] that recent claims for enhanced "stakeholderism" were entirely consistent with established principles of corporate law. While it is certainly true that corporate law standards will usually require the directors to take into account all (foreseeably) relevant implications of business decisions, including for stakeholders, such obligations – again, irrespective of the doctrinal background – thus far appear to have been focused on those implications that are actually relevant to the financial position of the company. This is entirely consistent with the notion of "enlightened shareholder value", a concept first developed in two papers by Michael Jensen on the trade-offs between value maximization and the role of stakeholder interests

[34] Cf., for similar conclusions from a US perspective (with a focus on Delaware law), Rock, *supra* n. 10, at pp. 375-6.
[35] Cf., reaching a similar conclusion for specific scenarios, ALI, *supra* n. 4, pp. 31-3; Rock, ibid.
[36] See, prominently, Colin Mayer, 'Shareholderism versus Stakeholderism – A Misconceived Contradiction. A Comment on "The Illusory Promise of Stakeholder Governance" by Lucian Bebchuk and Roberto Tallarita', Cornell L. Rev. 106 (2021), 1860.

published in 2002 and 2010[37] and incorporated into the UK Companies Act 2006[38] on the recommendation of the Company Law Review Committee on the basis of a comprehensive evaluation of English case law and academic contributions.[39] According to established standards, a corporate director would thus not just be prohibited, as a rule, to attach greater weight to *stakeholder* interests than to the financial interests of his or her corporation when preparing and taking business decisions. Moreover, corporate directors, under this standard, would *not* be subject to a *positive* obligation (qua fiduciary or other duties rooted in corporate law) to take specific steps to protect such interests if and to the extent that these interests could not reasonably be argued to have an impact on the corporation's financial position. To illustrate the point yet further: *Refraining* from potentially lucrative business opportunities involving potentially abusive or otherwise detrimental labour conditions in other parts of the world may be a perfectly defensible decision under the applicable standard of care and in recognition of the wide margin of discretion under modern business judgment rules (*e.g.*, in view of potentially adverse reactions by consumers or stakeholder initiatives which may come with a reputational damage).[40]

A *positive* obligation *not to use* such business opportunities, by contrast, has *not* been recognised under traditional concepts so far, regardless of the relevant doctrinal background. Likewise, *positive* obligations to systematically explore and assess such implications on an on-going basis – including with regard to implications not just of their own company's activities, but also of activities of suppliers in a

[37] Michael C. Jensen, 'Value Maximization, Stakeholder Theory, and the Corporate Objective Function', Business Ethics Quarterly 12 (2002), 235 and Journal of Applied Corporate Finance 22 (2010), 32, respectively. See, for a discussion of the concept in the present context, also Guido Ferrarini, 'Redefining Corporate Purpose: Sustainability as a Game Changer', in: Danny Busch, Guido Ferrarini and Seraina Grünewald (eds.), *Sustainable Finance in Europe* (2021) 85, at 88-91 and 96-108; Virginia Harper Ho, '"Enlightened Shareholder Value": Corporate Governance Beyond the Shareholder-Stakeholder Divide', J. Corp. L. 36 (2010), 59. For a critical analysis from a US perspective, cf. Dorothy S. Lund, 'Enlightened shareholder value, stakeholderism, and the quest for managerial accountability', in: Elizabeth Pollman and Robert B. Thompson (eds.), *Research Handbook on Corporate Purpose and Personhood* (Cheltenham: Edward Elgar, 2021)

[38] See UK Companies Act, section 172(1), whereby '[a] director of a company must act in the way he considers, in good faith, would be *most likely to promote the success of the company for the benefit of its members as a whole*, and *in doing so have regard* (amongst other matters) to (a) the likely consequences of any decision in the long term, (b) the *interests of the company's employees*, (c) the need to foster the company's business relationships with suppliers, customers and others, (d) the *impact of the company's operations on the community and the environment*, (e) the desirability of the company maintaining a reputation for high standards of business conduct, and (f) the need to act fairly as between members of the company' (emphasis added). For critical (and controversial) evaluations of this provision, see, e.g., Nicholas Grier, 'Enlightened shareholder value: did directors deliver?', Juridical Rev. (2014), 95; Andrew Keay, 'Having regard for stakeholders in practising enlightened shareholder value', Ox. U. Commonwealth L.J. 19 (2019), 118; id. and Hao Zhang, 'An Analysis of Enlightened Shareholder Value in Light of Ex Post Opportunism and Incomplete Law', ECFR (2011), 445; Richard Williams, 'Enlightened Shareholder Value in UK Company Law', UNSW L.J. 35 (2012), 360.

[39] Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: Developing the Framework* (London: Department of Trade and Industry, 2000), ch. 2 and 3.

[40] On the (potential and actual) role of consumer demand, cf. N. Craig Smith, 'Consumers as Drivers of Corporate Social Responsibility', in: Crane, *supra* n. 2, 281.

value chain –[41] or to take organizational steps to obtain and process relevant information, or liaise with, potentially affected stakeholders would go beyond what can be described as established principles of law in *any* traditional doctrinal background. Imposing such *positive* duties on corporate directors would deviate from established principles of law, irrespective of whether compliance with such duties would come with measurable costs for their respective corporation.

C. Understanding the nature of stakeholder-related directors' duties

Importantly, and related to the foregoing, the differences between stakeholder- and shareholder oriented concepts of directors' duties are, to some extent, balanced out by a feature common to both: As discussed before, both concepts promoting a (nominally) strict shareholder orientation and those allowing for a greater role of stakeholder interests in the formation of business decisions have always been, by and large, permissive, not restrictive: Across jurisdictions, the definition of directors' duties has served to delineate the limits of what officer holders can do, while their *general* obligation to exercise these powers in a way beneficial to the company has never been questioned. Directors' duties, in either system to date, have consisted of general duties of care rather than specific obligations with a prescriptive positive content. Exceptions – for example: a duty to file for bankruptcy proceedings in the interest of the company's creditors once statutory triggers such as balance-sheet insolvency or illiquidity are met – do exist, of course, but they have been limited in scope and generally been the outcome of a 'sedimentation' of findings established in successive cases into statutory law.[42] Generally speaking, corporate directors, irrespective of the doctrinal orientation of their respective jurisdiction, have been subjected to a general standard of care, by which individual measures would be measured if contested (for example in liability actions), while the specific content of business decisions (in whatever context) has been left to their discretion.

This regulatory concept can be explained on the grounds of the historic emanation of such duties in fiduciary law: Traditionally, across a wide range of jurisdictions at least (and not just in Common Law jurisdictions), the role of corporate directors and their obligations vis-à-vis the company itself, its shareholders and, to some extent, external stakeholders such as creditors, has been conceived as fiduciary in nature.[43] Just as with other types of fiduciaries, the law would measure their activities by general standards of care derived from established

[41] For a modern statutory version of such obligations under the incoming European Corporate Governance Due Diligence Directive, see *infra*, III. 2.

[42] For a comparative analysis of the evolution of directors' duties in different corporate law regimes, cf. Jens-Hinrich Binder, *Regulierungsinstrumente und Regulierungsstrategien im Kapitalgesellschaftsrecht* (Tübingen: Mohr Siebeck, 2012), pp. 506-37.

[43] Ibid. And cf., for an in-depth analysis of US and English corporate law in this regard, David Kershaw, *The Foundations of Anglo-American Corporate Fiduciary Law* (Cambridge: Cambride University Press, 2018), in particular pp. 23-133; similarly, including also Australian law, Jennifer G. Hill and Matthew Conaglen, 'Directors' duties and legal safe harbours: a comparative analysis', in: Smith and Gold, *supra* n. 19, 305; and see Jennifer G. Hill, 'Corporations, Directors' Duties and the Public/Private Divide', in: Arthur B. Laby and Jacob Hale Russell (eds.), *Fiduciary Obligations in Business* (Cambridge: Cambridge University Press, 2021), 285.

principles of fiduciary law, which provide for restrictions for certain types of decisions (e.g., decisions motivated by conflicts of interests on the part of directors, or other decisions clearly incompatible with the interests of the beneficiary), but otherwise do not interfere with the fiduciary's discretion. Evidently, both the treatment of stakeholder interests in jurisdictions following the shareholder supremacy approach discussed above and the role of such interests in jurisdictions traditionally allowing for a broader stakeholder orientation are perfectly consistent with this tradition. As discussed before, *both* doctrinal backgrounds, for all their conceptual differences, allow for, and respect, a certain margin of discretion also with regard to the advancement of stakeholder interests through business decisions, while *both* have traditionally refrained from prescribing any specific normative content in this regard.

If the above analysis is true, claims for *enhanced* "stakeholderism" and, specifically, for positive obligations – contrary to what has been argued in the existing literature[44] – cannot be described as consistent with established principles of corporate law from a functional perspective, or, to be more precise: a *modal* perspective. *Positive* obligations to cater for stakeholder interests (in whatever form and however they may be enforced) do not just deviate from the established substantive content of directors' duties; they also deviate from the traditional regulatory mode, adding entirely new *prescriptive* content and thus new exceptions to the general principle that directors' duties have traditionally been largely permissive, with only a few restrictive elements. Against this backdrop, claims for enhanced "stakeholderism" reflect an understanding of the role of corporate law that fundamentally deviates from traditional interpretations, whereby directors are, by and large, free to define and implement business decisions as they think fit, within a very broad corridor, subject to only a limited range of restrictions established in the interest of the company, its shareholders and, to some extent, its creditors. Claims to the effect that corporate directors should *generally* be aware of a wide range of stakeholder interests, and should take measures – including by organizational arrangements – to protect them on an on-going basis, by contrast, are effectively *regulatory* in nature; imposing such duties would mean no less than changing the established role of the law – and the very nature of directors' duties as they have evolved over the centuries.

As a consequence, in traditional systems of corporate law, whatever their doctrinal origins and orientation, it is perfectly legal (and, indeed, necessary) for corporate directors to respond to changing patterns in investor or consumer preferences which have an impact on the respective business models and, thus, its ultimate viability. Frontrunning such changes, in accordance with personal preferences, by promoting policies irrespective of their impact on the long-term profitability is not. In other words: The promotion of stakeholder interests as an

[44] See, again, Mayer, *supra* n. 36.

objective separate from pursuing the long-term profitability of corporations would be entirely inconsistent with established principles.

D. Understanding the impact of "stakeholderism" for "stakeholderist" jurisdictions

Finally, all of the above considerations are also helpful in that they facilitate a better understanding of the (potential) impact of claims for enhanced stakeholder orientation in those jurisdictions which have traditionally rejected the concept of strict shareholder supremacy, and more open to the advancement of stakeholder interests in business decisions. German corporate law provides ample illustration in this regard: The concept of *strict* shareholder supremacy, which has been advocated occasionally also in German academic literature,[45] has never been accepted as the guiding principle for the interpretation and application of general fiduciary duties of corporate directors, and the standard of care for the evaluation of business decisions has been defined so as to include also the protection of stakeholder interests.[46] Still, irrespective of this doctrinal background, the surge in CSR-related (reporting) obligations has met with substantial criticism amongst German scholars, and the notion that, as a consequence, the traditional orientation of directors' duties ought to be reinterpreted so as to include *positive* obligations to cater for stakeholder interests under the German *Aktiengesetz* (the Stock Corporation Act)[47] has been largely rejected by the majority of legal scholars and have not been recognised in case law either.[48]

In view of the foregoing, the reasons are not difficult to understand. As discussed before, "stakeholderist" jurisdictions, to use that misleading term again, traditionally may have taken a broader perspective as far as the role of stakeholder interests in the formation of business decisions (and, ultimately, in the definition of the purposes of company law more generally)[49] is concerned, but have *not* gone as far as to comprehensively subordinate the financial success of the company to any such external interests. As a consequence, the imposition of *positive* obligation to cater for stakeholder concerns inevitably has to be interpreted as a deviation from established practices also in such jurisdictions. This conclusion is, effectively, also reflected in the European Commission's recent consultation on the further development of European company law in order to enhance the sustainability of

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[45] Cf., e.g., Peter O. Mülbert, 'Marktwertmaximierung als Unternehmensziel der Aktiengesellschaft', in: Georg Crezelius, Heribert Hirte and Klaus Vieweg (eds.), *Festschrift für Volker Röhricht zum 65. Geburtstag* (2005), 421; see also Christoph Kuhner, 'Unternehmensinteresse vs. Shareholder Value als Leitmaxime kapitalmarktorientierter Aktiengesellschaften', *ZGR – Zeitschrift für Unternehmens- und Gesellschaftsrecht* (2004), 244.

[46] See, again, *supra* n. 24 and accompanying text.

[47] Cf., for suggestions to that effect, e.g., Peter Hommelhoff, 'Nichtfinanzielle Ziele in Unternehmen von öffentlichem Interesse – Die Revolution über das Bilanzrecht', in: Reinhard Bork et al. (eds.), *Festschrift für Bruno Kübler zum 70. Geburtstag* (2015), p. 291; id., 'Nichtfinanzielle Unternehmensziele im Unionsrecht — Zwanzig Bemerkungen zum Kommissionsvorschlag für die Novellierung der 4. und 7. Bilanzrichtlinie vom April 2013', in: Burkhard Boemke et al. (eds.), *Festschrift für Gerrick Frhr. von Hoyningen-Huene zum 70. Geburtstag* (2014), p. 137.

[48] For a comprehensive recent review of the literature and relevant case law, see, e.g., Koch, *supra* n. 24, at paras. 35-35g.

[49] Cf., in this regard, Armour et al., *supra* n. 17, at pp. 23-4.

corporate governance arrangements, carried out between 2020 and 2021, which had solicited the respondents' views on whether companies environmental and social responsibilities should be bolstered through express and specific directors' obligations to that effect imposed by EU legislation[50] – thereby recognising that the introduction of new obligations in the field would deviate from established concepts of corporate law and governance.

III. WHICH DUTIES? EMERGING OBLIGATIONS IN THE LIGHT OF STATUTORY FRAMEWORKS AND INTERNATIONAL STANDARDS – A EUROPEAN PERSPECTIVE ON A GLOBAL TREND

Against the backdrop developed above, the following section continues to explore the dimension of stakeholder-related directors' obligations by identifying specific prescriptive duties and analysing their functional characteristics. The section examines, first, the current position in European corporate law and incoming challenges (infra, 1.) and, subsequently, relevant international standards (infra, 2.), which have been incorporated by reference in a number of relevant obligations under European law. Adopting a functional perspective, the remainder of the section then analyses key characteristics of the relevant obligations under both regimes, and discusses potential implications for the addressees.

1. EUROPEAN CORPORATE AND NON-FINANCIAL REPORTING LAW

Within European Union law, specific prescriptive norms requiring the advancement of stakeholder interests have so far been limited to reporting obligations relating to issues of corporate social responsibility, which, to date, continue to be prescribed mainly by what has become known as the Non-Financial Reporting Directive ("NRFD") of 2014.[51] Even prior to the adoption of that instrument, European regulation of corporate accounting principles, going back to

[50] For details, see https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/public-consultation_en. And cf., for critical analysis, Guido Ferrarini, Michele Siri and Shanshan Zhu, 'The EU Sustainable Governance Consultation and the Missing Link to Soft Law', ecgi Law Working Paper 576/2021, available at https://ssrn.com/abstract=3823186. See also, analysing specific policy options in this respect, European Commission, 'Study on directors' duties and sustainable corporate governance – Final Report' (2020), at pp. 61-9. For a forceful critique of the study, cf. Mark J. Roe et al., 'The Sustainable Corporate Governance Initiative in Europe', Yale J. on Reg. Bull. 38 (2021), 133.

[51] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, OJ L 330 of 15 November 2014, p. 1.

a Commission recommendation of 2001,[52] had required companies to disclose information relating to 'environmental and social aspects' as part of the management report in their annual accounts, but only to the extent 'necessary and for an understanding of the company's development, performance or position.'[53] In comparison with these earlier requirements, which continue to apply but have not been specified any further as such,[54] the 2014 NRFD went a substantial step further by requiring large listed companies (and certain financial intermediaries)[55] to include in the annual management report

> 'a non-financial statement containing information to the extent necessary for an understanding of the undertaking's development, performance, position and impact of its activity, relating to, as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters, including:
>
> (a) a brief description of the undertaking's business model;
>
> (b) a description of the policies pursued by the undertaking in relation to those matters, including due diligence processes implemented;
>
> (c) the outcome of those policies;

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52 Commission Recommendation of 30 May 2001 on the recognition, measurement and disclosure of environmental issues in the annual accounts and annual reports of companies, OJ L 156 of 13 June 2001, p. 33.

53 See Directive 2003/51/EC of the European Parliament and of the Council of 18 June 2003 amending Directives 78/660/EEC, 83/349/EEC, 86/635/EEC and 91/674/EEC on the annual and consolidated accounts of certain types of companies, banks and other financial institutions and insurance undertakings, OJ L 178 of 17 July 2003, p. 16, Recital 9: 'The annual report and the consolidated annual report are important elements of financial reporting. Enhancement, in line with current best practice, of the existing requirement for these to present a fair review of the development of the business and of its position, in a manner consistent with the size and complexity of the business, is necessary to promote greater consistency and give additional guidance concerning the information a "fair review" is expected to contain. The information should not be restricted to the financial aspects of the company's business. It is expected that, where appropriate, this should lead to an analysis of environmental and social aspects necessary for an understanding of the company's development, performance or position.' The new reporting requirements where then laid down in Article 1(14) of Directive 2003/51/EC, amending Article 46 of the Fourth Council Directive 78/660/EEC of 25 July 1978 (…) on the annual accounts of certain types of companies, OJ L 222 of 14 August 1978, p. 11, as well as Article 2(10) of Directive 2003/51/EC, amending Article 36(1) of the Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Article 54 (3) (g) of the Treaty on consolidated accounts, OJ L 193 of 18 July 1983, p. 1.

54 See now Article 19(1) subpara. (3) of Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings (…), OJ L 182 of 29 June 2013, p. 19.

55 In the words of Article 19a(1) of Directive 2013/34/EU as amended by Directive 2014/95/EU: 'large undertakings which are public-interest entities exceeding on their balance sheet dates the criterion of the average number of 500 employees'. 'Large undertakings' within that meaning are defined by Article 3(4) of Directive 2013/34/EU as 'undertakings which on their balance sheet dates exceed at least two of the three following criteria: (a) balance sheet total: EUR 20 000 000; (b) net turnover: EUR 40 000 000; (c) average number of employees during the financial year: 250.' 'Public-interest entities', as defined by Article 2(1) of Directive 2013/34/EU, are 'undertakings within the scope of Article 1 [which, in turn, is defined by reference to two Annexes of the Directive] which are: (a) governed by the law of a Member State and whose transferable securities are admitted to trading on a regulated market of any Member State (…); (b) credit institutions (…); (c) insurance undertakings (…); or designated by Member States as public-interest entities, for instance undertakings that are of significant public relevance because of the nature of their business, their size or the number of their employees".

> (d) the principal risks related to those matters linked to the undertaking's operations including, where relevant and proportionate, its business relationships, products or services which are likely to cause adverse impacts in those areas, and how the undertaking manages those risks;
> (e) non-financial key performance indicators relevant to the particular business.'[56]

Significantly, when reporting pursuant to that provision,

> 'undertakings may rely on national, Union-based or international frameworks, and if they do so, undertakings shall specify which frameworks they have relied upon.'[57]

While refraining from defining any specific substantive duties in this regard, European law, through this latter provision, effectively referred to CSR standards promulgated by a wide range of international bodies, including, for example, European agencies, but also the United Nations (UN), the OECD, or the International Organization for Standardisation.[58]

Corresponding requirements were introduced for the consolidated annual accounts of corporate groups.[59] The European Commission, using its mandate under Article 2 of the CSR Directive, has promulgated non-binding complementary guidelines on non-financial reporting generally (in 2017),[60] as well as on specific aspects on reporting climate-related information (in 2019),[61] which reconfirm the general strategy to implement relevant international standards as part of the European law approach to CSR reporting.

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[56] Article 19a(1), subpara. (1) of Directive 2013/34/EU as introduced by Article 1(1) of the CSR Directive.
[57] Article 19a(1), subpara. (5) of Directive 2013/34/EU as introduced by Article 1(1) of the CSR Directive.
[58] CSR Directive, Recital 9: 'In providing this information, undertakings which are subject to this Directive may rely on national frameworks, Union-based frameworks such as the Eco-Management and Audit Scheme (EMAS), or international frameworks such as the United Nations (UN) Global Compact, the Guiding Principles on Business and Human Rights implementing the UN 'Protect, Respect and Remedy' Framework, the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises, the International Organisation for Standardisation's ISO 26000, the International Labour Organisation's Tripartite Declaration of principles concerning multinational enterprises and social policy, the Global Reporting Initiative, or other recognised international frameworks.' By the same token, Recital 11 also expressly refers to the influence of UN work in the field: 'Paragraph 47 of the outcome document of the United Nations Rio+20 conference, entitled 'The Future We Want', recognises the importance of corporate sustainability reporting and encourages undertakings, where appropriate, to consider integrating sustainability information into their reporting cycle. It also encourages industry, interested governments and relevant stakeholders with the support of the United Nations system, as appropriate, to develop models for best practice, and facilitate action for the integration of financial and non-financial information, taking into account experiences from already existing frameworks.'
[59] Article 29a of Directive 2013/34/EU as introduced by Article 1(3) of the CSR Directive.
[60] European Commission, 'Communication from the Commission: Guidelines on non-financial reporting (methodology for non-financial reporting' (2017/C/215/01), OJ C 215 of 5 July 2017, p. 1.
[61] Id., 'Communication from the Commission: Guidelines on non-financial reporting: Supplement on reporting climate-related information' (2019/C 209/01), OJ C 209 of 20 June 2019, p. 1.

Based on a Commission Proposal released in 2021,[62] which in turn reflects the Commission's ambitious agenda first published in 2011 and subsequently adjusted and expanded in scope in 2019/20,[63] the 2014 Directive has now been amended by a new Corporate Sustainability Reporting Directive ("CSRD") of 2022.[64] Under the revised regime, the scope of application of CSR reporting requirements is far wider than under the 2014 CSR regime,[65] has been extended to 'sustainability matters' more generally.[66] Moreover, the new Directive establishes a new framework for the development of "sustainability reporting standards", whereby the European Commission will be empowered to adopt delegated legislation on reporting standards relating to environmental, social and governance factors. It will do so in consultation with the European Financial Reporting Advisory Group ("EFRAG"), an expert body established in 2001 to assist the European Commission in relation to the adaptation of international financial reporting standards.[67] Moreover, statutory audit requirements have also been expanded, in order to activate the (private sector) auditors as enforcers of relevant requirements.[68] All in all, the reformed regime develops its predecessor into a rather comprehensive set of new requirements, both substantive and procedural in nature, much more detailed – and far wider in scope. The new regime also marks the shift from the traditional CSR focus to the broader concept of ESG, covering a considerably wider range of relevant issues.[69] From a functional perspective, however, the new Directive does

[62] European Commission, 'Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting', COM(2021) 189 final (21 April 2021)

[63] See European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A renewed EU strategy 2011-14 for Corporate Social Responsibility, COM(2011) 681 final (25 October 2011); European Commission and High Representative of the Union for Foreign Affairs and Security Policy, 'Joint Communication to the European Parliament and the Council: EU Action Plan on Human Rights and Democracy 2020-2024' (25 March 2020), JOIN(2020) 5 final; see also European Commission, 'Reflection Paper: Towards a Sustainable Europe by 2020' . Note that, in this context, the focus of specific measures to date has been primarily on the protection of global climate.

[64] Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting, OJ L 322 of 16 December 2022, p. 15.

[65] Ibid., introducing a revised Article 19a into Directive 2013/34/EU, whereby the scope would extend to 'large undertakings' generally as well as also to listed small and medium-sized companies.

[66] Ibid. 'Sustainability matters' are defined, in a broad sense as "environmental, social and human rights, and governance factors", cf. Directive 2013/34/EU, Article 1(2)(17) as introduced by Directive (EU) 2022/2464.

[67] Ibid., Articles 29b and 29c (on 'corporate sustainability reporting standards' and 'corporate sustainability reporting standards for SMEs', respectively).

[68] Ibid., Articles 26a, 27a, 28a and 36a.

[69] Cf. ibid., Article 29b(2): 'The sustainability reporting standards shall ensure the quality of reported information, by requiring that it is understandable, relevant, verifiable, comparable and represented in a faithful manner. (…)

The sustainability reporting standards shall, taking into account the subject matter of a particular sustainability reporting standard:

(a) specify the information that undertakings are to disclose about the following environmental factors:
   (i) climate change mitigation, including as regards scope 1, scope 2 and, where relevant, scope 3 greenhouse gas emissions;
   (ii) climate change adaptation;
   (iii) water and marine resources;

not deviate from the established strategy of *indirect*, procedural regulation through the imposition and enforcement of reporting requirements, compliance with which will be based on a variety of international standards at the discretion of corporate management. Specifically, it does *not* impose any substantive duties of care with regard to individual stakeholder interests.

Taken together, European CSR and ESG law, as it currently stands, thus can be described as following a *procedural* rather than a substantive concept of *indirect* regulation: Rather than imposing more or less specific substantive requirements, large listed (and certain other) companies have been required merely to assess the implications of their business activities on certain stakeholder interests, adopt (unspecified) 'policies' in relation to such interests, and include relevant information in their annual accounts, and they may do so by way of reference to accepted international standards (which, as shall be discussed further below, do not define any specific positive obligations either). By requiring and enforcing transparency in this respect, the (reformed) CSR Reporting Directive clearly reflects the expectation that rising investor (and stakeholder) awareness of relevant policies would create market pressure and, by gearing investment towards companies with more

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(iv) resource use and the circular economy;
(v) pollution;
(vi) biodiversity and ecosystems;

(b) specify the information that undertakings are to disclose about the following social and human rights factors:

(i) equal treatment and opportunities for all, including gender equality and equal pay for work of equal value, training and skills development, the employment and inclusion of people with disabilities, measures against violence and harassment in the workplace, and diversity;
(ii) working conditions, including secure employment, working time, adequate wages, social dialogue, freedom of association, existence of works councils, collective bargaining, including the proportion of workers covered by collective agreements, the information, consultation and participation rights of workers, work-life balance, and health and safety;
(iii) respect for the human rights, fundamental freedoms, democratic principles and standards established in the International Bill of Human Rights and other core UN human rights conventions, including the UN Convention on the Rights of Persons with Disabilities, the UN Declaration on the Rights of Indigenous Peoples, the International Labour Organization's Declaration on Fundamental Principles and Rights at Work and the fundamental conventions of the International Labour Organization, the European Convention for the protection of Human Rights and Fundamental Freedoms, the European Social Charter, and the Charter of Fundamental Rights of the European Union;

(c) specify the information that undertakings are to disclose about the following governance factors:

(i) the role of the undertaking's administrative, management and supervisory bodies with regard to sustainability matters, and their composition, as well as their expertise and skills in relation to fulfilling that role or the access such bodies have to such expertise and skills;
(ii) the main features of the undertaking's internal control and risk management systems, in relation to the sustainability reporting and decision-making process;
(iii) business ethics and corporate culture, including anti-corruption and anti-bribery, the protection of whistleblowers and animal welfare;
(iv) activities and commitments of the undertaking related to exerting its political influence, including its lobbying activities;
(v) the management and quality of relationships with customers, suppliers and communities affected by the activities of the undertaking, including payment practices, especially with regard to late payment to small and medium-sized undertakings.

sustainable business models, indirectly force management to adjust their behaviour accordingly.[70]

The actual impact of such requirements, however, remains as obscure as the incentives associated with them: As will have become clear from the wording of the relevant obligations, corporate directors retain a substantial margin of discretion not just with regard to the identification of relevant stakeholder interests and corresponding risks, but also to the development and substantive content of policies adopted to address them – as well as in relation to the content and granularity of the mandatory report. Although the new framework for the development of harmonised non-financial reporting standards certainly can be expected to drive the further convergence of market practices in this regard and (along with other legislative activities) may ultimately accomplish a higher level of standardisation of relevant information, the core obligation essentially remains a duty to disclose intentions and policies rather than a duty to adopt specific measures for the protection of stakeholder interests with no real sanction other than the ultimate judgment of investors – whether or not these may ultimately turn out to appreciate the disclosed information and adjust their investments accordingly.[71]

2. NEW HORIZONS? INCOMING CORPORATE SUSTAINABILITY DUE DILIGENCE LEGISLATION

The legislative self-restraint in terms of positive substantive duties may come to an end, however, with yet another Commission proposal currently in the legislative process, namely the Corporate Sustainability Due Diligence Directive (CSDDD).[72] With this proposal (currently in the legislative process), the European Commission, following up on international standards[73] and earlier legislation in a number of Member States,[74] has proposed the introduction of substantive CSR due diligence obligations for certain corporations above certain quantitative thresholds.[75] The proposal first envisages an obligation to 'integrate due diligence

[70] Cf., for a comparative perspective on the European approach, also Harper Ho and Park, *supra* n. 8, at pp. 302-6.
[71] For the available empirical evidence, see, again, sources cited *supra* n. 14.
[72] European Commission, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final (23 February 2022).
[73] See ibid., pp. 1-2.
[74] See, for an analysis of the general background, e.g., Alain Pietrancosta, 'Codification in Company Law of General CSR Requirements: Pioneering Recent French Reforms and EU Perspectives', ecgi Law Working Paper no. 639/2022 (October 2022), available at https://ssrn.com/abstract=4083398, pp. 9-13, 21-2. On the European Commission's preparatory study (*supra* n. 71), see also Mark J. Roe, Jesse Fried, Holger Spamann and Charles Wang, 'The sustainable corporate governance initiative in Europe', 38 Yale J. on Reg. Bull 133 (2021).
[75] For details, see Commission Proposal (*supra* n. 72), Art. 2a in conjunction with Article 3(a): certain types of corporations with more than 500 employees on average and a net worldwide turnover of more than EUR 150 million irrespective of their business activities or, alternatively, more than 250 employees and a net worldwide turnover of more than EUR 40 million, if at least 50 % of this turnover is generated in one or more designated sectors (e.g., manufacture of textiles, agriculture, fisheries, food products, extraction of mineral resources).

into all (…) corporate policies and [to] have in place a due diligence policy'.[76] While this duty remains rather vaguely defined and does not prescribe specific substantive elements, corporations, under the proposed Directive, will also be obliged to

> 'take appropriate measures to identify actual and potential adverse human rights impacts and adverse environmental impacts arising from their own operations or those of their subsidiaries and, where related to their value chains, from their established business relationships,'[77]

including consultations with potentially affected stakeholder groups in this context.[78] Moreover, corporations will also be required to take specific action in order

> 'to prevent, or where prevention is not possible or not immediately possible, adequately mitigate potential adverse human rights impacts and adverse environmental impacts that have been, or should have been, identified'[79]

in the process just mentioned, and to bring to an end or 'neutralise' adverse effects in due course.[80] In addition to these obligations and complementing them, companies will be required to establish complaints procedures for aggrieved stakeholders,[81] to carry out periodic self-assessments with regard to their compliance,[82] and to regularly report on due diligence matters (if they are not subject to the reporting requirements under the NFRD).[83] Significantly, the draft Directive also provides for a rather complex sanctions and enforcement regime, including monitoring obligations for designated authorities in each Member State,[84] the obligation for Member States to provide for effective sanctions in their national laws,[85] and, above all, civil liability to aggrieved parties for breaches of specific due diligence obligations.[86] Going even further, Article 25 of the original Commission Draft then anticipated a rather fundamental amendment of existing company legislation by requiring that

> '1. Member States shall ensure that, when fulfilling their duty to act in the best interest of the company, directors of companies (…) *take into account the*

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[76] Ibid., Article 5(1).
[77] Ibid., Article 6(1).
[78] Ibid., Article 6(4).
[79] Ibid., Article 7(1). This obligation is then specified further in the subsequent paragraphs, which provide for specific steps and required investments in this regard.
[80] Ibid., Article 8.
[81] Ibid., Article 9.
[82] Ibid., Article 10.
[83] Ibid., Article 11.
[84] Ibid., Articles 17-19.
[85] Ibid., Article 20.
[86] Ibid., Article 22.

> *consequences of their decisions for sustainability matters*, including, where applicable, human rights, climate change and environmental consequences, including in the short, medium and long term [and]
> 2. Member States shall ensure that their laws, regulations and administrative provisions providing for a breach of directors' duties apply also to the provisions of this Article.'

Last not least, Article 26 then requires corporate directors to be personally responsible for compliance with due diligence duties. Article 25, however, appears to have been excluded in response to substantial criticism from individual Member States.[87]

Measured against the *status quo ante* in European law, whose focus – as discussed above – has been on reporting obligations but left it to corporations and their directors to determine the substance of their engagement for stakeholder interests (if any), the proposed Directive clearly will mark a drastic shift in the underlying regulatory paradigm. Addressees will be required to take specific and potentially costly steps with detrimental effects on firms' profits. Although the restatement of directors' duties in Article 25 of the original Draft appears to be off the table, directors of corporations falling within the Directive's scope of application would still, to some extent, be provided with a new compass: a new standard measure for corporate decision making that change profoundly their fiduciary duty towards the firm and, ultimately, the shareholders as beneficial owners, whether or not these consent.[88]

At the same time, it is striking that, for all its granularity, the draft Directive still remains rather vague as to how exactly directors will be expected to behave, and could aptly be described as a rather peculiar arrangement of highly prescriptive obligations in rather vaguely defined terms. Key concepts determining the relevant obligations, such as "appropriate measures", "(severe) adverse impacts", or the "effectiveness" of policies and measures, have taken the form of general principles, which have to be interpreted and specified further in the course of application by addressees, the newly assigned national supervisory authorities, and, ultimately, the courts. To be sure, relevant obligations have been specified, to some extent, in the Annexes to the Directive, including by way of reference to specific international standards and agreements.[89] Nonetheless, as these standards themselves tend to be defined vaguely and focus on general principles and procedural standards rather than specific rules,[90] the resulting legal uncertainty still can be expected to be

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[87] Cf. Council of the European Union, General Approach relating to the Commission Proposal (30 November 2022), Interinstitutional File 2022/0051(COD) – 15024/1/22 – REV 1, para. 31.
[88] See, for further analysis, Pietrancosta, *supra* n. 74, pp. 56-7 (noting differences between European jurisdictions in this regard).
[89] See ibid., Annex I.
[90] See, for further discussion, e.g., Jens-Hinrich Binder, 'Neue Vielfalt der Regelgeber und Regelungstechniken im Gesellschafts- und Kapitalmarktrecht unter Einschluss des Bilanzrechts', ZGR – Zeitschrift für Unternehmens- und Gesellschaftsrecht (2022), 502, at 512-3.

substantial.[91] It will be aggravated further by the fact that the range of relevant interests – environmental and social interests alike – may conflict and be difficult to balance, let alone reconcile, in the circumstances of each particular case.[92] Given, further, the uncertainties associated with (diverging national) requirements for the assertion of civil liability as sanctions for (alleged) breaches of obligations under the new regime,[93] the challenges for directors seeking orientation can hardly be underestimated. Whether or not (and when) a consistent interpretation of these standards can be expected to emerge is as uncertain as the actual effectiveness in terms of greater awareness of stakeholder interests – and, indeed, in terms of substantial improvements with regard to their protection.

3. EUROPE AND THE BROADER PICTURE: PARALLELS, DIFFERENCES AND SUBSTANTIVE OUTCOMES

At first sight, European legislation may appear well in line with broader international trends towards greater awareness for stakeholder interests in corporate decision-making. This impression is certainly reinforced by the fact that already within the present framework of CSR- and ESG-related reporting obligations, but in particular under the incoming Corporate Sustainability Due Diligence Directive, specific obligations refer to, and to some extent, effectively incorporate relevant standards promulgated by a broad range of international standard setters. Nonetheless, the European law approach to promoting stakeholder interests clearly stands out at least in one important respect:[94] Taken together, both under the existing (and recently reformed) framework governing disclosure of non-financial information and, in particular, under the incoming regime to be established by the CSDDD, it presents itself as distinctively regulatory in nature: Within this context, legal requirements for corporate decision-making – unlike under established principles of corporate governance – are regulated *not* primarily in the interest of the firm and its shareholders, but in order to *instrumentalise* them in the public interest. In stark contrast to the situation in US markets, business decisions and firm behaviour with regard to CSR- or ESG-related matters, under the European approach, will be motivated to an important degree *not* by *actual* demand for relevant policies, in response to *actual* investor and/or consumer pressure, but by compliance needs perceived or real. In the absence of effective representation of shareholders in corporate decision making, the decision to invest or disinvest (directly or indirectly, through ESG-oriented funds) is essentially the only transmission mechanism for investors' ESG preferences. As noted above, CSR reporting

[91] Cf., for further analysis, Pietrancosta, *supra* n. 74, pp. 29-37.

[92] Cf., e.g., Alperen A. Gözlügöl, 'The Clash of "E" and "S" of ESG: Just Transition on the Path to Net Zero and the Implications for Sustainable Corporate Governance and Finance', J. World Energy L. & Bus. 15 (2022), 1 (discussing potential conflicts between environmental and social interests in this regard).

[93] See also ibid., pp. 45-6.

[94] Cf., for a comparative analysis, again Harper Ho and Park, *supra* n. 8.

obligations are meant to incentivise, and reinforce, market pressure by investors expressing their ESG preferences, but it remains uncertain whether or not this effect has been accomplished as intended, as a causal link between compliance with applicable standards and stock prices appears difficult to establish.[95] To be sure, it remains an open question whether or not legislative intervention is justifiable or even necessary in order to improve the standardisation of relevant information and, thus, the comparability of investment opportunities in a setting where the markets themselves have failed to accomplish just that[96], and the present paper does not offer a final verdict in this respect. Arguably, however, there are solid reasons to assume that the instrumentalization of disclosure standards in order to incentivise investors and/or consumers in the form established within the EU, for the reasons stated above, have not been overly successful.

IV. HOW WILL THEY RESPOND? THE REORIENTATION OF DIRECTORS' DUTIES AND THEIR IMPLICATIONS IN THE REAL WORLD

While actual outcomes – in terms of investor preferences and, ultimately, the economic outcome of existing and incoming regulation – are difficult to predict, some observations are nonetheless possible already on the basis of the above functional analysis. First and foremost, in a system characterised by prescriptive positive obligations, directors' incentives are likely to differ fundamentally from those in system where activist shareholders constitute the main driver: If strategic as well as individual business decisions with implications for the position of stakeholders will be made less in response to specific initiatives by investors or, for that matter, perceived investor preferences reflected in the stock price, but motivated by prescriptive regulatory obligations, the substantive content of such decisions can be expected to reflect, in addition to other motives, a strong desire to comply with such obligations (just) to the extent necessary to avoid sanctions. To put it differently: While directors facing pressure by activist investors may ask whether, and to what extent, they are entitled to act accordingly without risking a breach of fiduciary obligations geared towards ensuring the profitability of the firm, directors facing a complex set of prescriptive ESG reporting obligations are likely to do whatever they perceive to be necessary in order to be able to demonstrate compliance with these obligations, regardless of what their general obligation towards the firm may be, and regardless of actual substantive outcomes.

The substantive *economic* outcome of relevant decisions may look very different in these two scenarios, especially where – as has been diagnosed above both with

[95] But see, again, Marco Becht, Anete Pajuste and Anna Toniolo, *supra* n. 13.
[96] For a detailed argument to that effect, cf., e.g., Virginia Harper Ho, 'Modernising ESG Disclosure', U. Ill. L. Rev. (2022), 277, and see, again, id. and Park, *supra* n. 8.

regard to the existing European framework of CSR reporting obligations *and* with regard to the incoming Due Diligence Directive – the relevant obligations have been drafted in a way that leaves a substantial margin of discretion for management decisions. Business decisions driven by specific investor demand, e.g., made upon successful votes in shareholder meetings, or motivated by changes in consumer behaviour, can be expected to take a rather specific form: by implementing new business models, specific activities, or strategies – or by adjusting, or giving up, old ones. As noted before, in the absence of regulatory intervention, whether or not firms will move towards more sustainable business models will depend, to a large extent, on actual investors' or consumers' preferences – in other words: on who invests in a firm, or who is willing (and on what conditions) to purchase its products or services. While it remains dubious whether changes driven by investor demand come with actual benefits in terms of increased "stakeholder value" also in these circumstances, the scope for decisions motivated exclusively by the directors' own judgment appears to be more limited in the absence of specific regulatory requirements. By contrast, if and to the extent relevant objectives are defined in vague principles rather than specific, rules-based targets, the operationalization and, thus, also the further specification of relevant objectives falls to corporate directors in the first place. Against this backdrop, legal uncertainty as to the substantive content, unwelcome though it may appear at first sight, may ultimately turn out to open a rather welcome room for manoeuvre: a 'new area of managerialism', with ever more limited control for managerial discretion.[97]

The legislative technique employed in the applicable EU legislation is of particular interest in this context. As noted above, relevant obligations thus far have refrained from imposing specific positive duties other than reporting obligations. The overall regulatory strategy can be described as procedural in nature, aiming at incentivising market pressure on corporate decisions and incorporating international best practice standards which, in turn, rely heavily on broad principles rather than specific substantive rules. Against this backdrop, it may appear tempting to describe the regulatory approach as "principles based" – and thus benefiting from perceived advantages that have long been associated with this type of regulation: Unlike rules, which define the required (or prohibited) behaviour in clear-cut terms, but thus provide ample room for what has been aptly described "compliant non-compliance"[98] (compliance in form, but avoiding the legislative intention in substance), principles-based regulation is widely believed to be more effective, in

[97] Cf. Lucian A. Bebchuk and Roberto Tallarita, *supra* n. 12, at 43 (summarising critical analyses in US corporate law doctrine): '[Critics] worry that relying on managerial discretion and corporate leaders' pledges to serve stakeholders would not produce significant benefits for stakeholders; rather, it would harm stakeholders by worsening the economic performance of the company and by creating illusory and distracting hopes for stakeholder welfare.' But see, for a more positive assessment (based on empirical studies), also Allen Ferrell, Hao Liang and Luc Renneboog, 'Socially responsible firms', J. Fin. Econ. 122 (2016), 585.
[98] John Braithwaite, 'Rules and Principles: A Theory of Legal Certainty' Austl. J. Leg. Phil. 27 (2002), 47, 55 -6.

that it defines a broad standard of conduct which will be interpreted – and adjusted to address relevant behaviour – flexibly in the circumstances and thus reduce the scope for norm evasion.[99] At first sight, the vague nature of relevant standards could thus be interpreted as beneficial and, indeed, as particularly effective in view of the highly diverse range of activities covered. On closer inspection, however, things may well turn out rather differently. As part of the established framework of non-financial reporting, vaguely defined concepts inevitably facilitate a wide range of potential interpretations.[100] As discussed above, this is so particularly if potentially conflicting stakeholder interests are treated indiscriminately. With no ultimate arbiter at hand, and in the absence of binding further standardisation, information on individual policies and measures based on, and responding to such, concepts and standards – unlike traditional forms of principles-based standards – are unlikely to promote actual best practice, and probably will give rise to confusing, incoherent signals instead. With corporate directors unable to establish with certainty what the expected conduct will be, creative and self-serving interpretations of relevant expectations are likely to abound. Absent comparable, standardised parameters with which investors could distinguish between firms (provided they have an actual interest to do so), a meaningful market response cannot happen. The established, procedural form of indirect regulation based on vaguely defined parameter thus may well fail on a number of grounds – and ultimately prove counterproductive.

If, then, the concept of indirect, procedural regulation based on vaguely defined standards is unlikely to yield meaningful results – will this be any different following introduction of substantive duties by the proposed Corporate Sustainability Due Diligent Directive (if and when ultimately adopted)? To be sure, as discussed above, the range of prescriptive duties anticipated by the Commission proposal is as wide as the proposed range of enforcement mechanisms in private and administrative law.[101] Nonetheless, as also mentioned before, management decisions will continue to be measured by their compliance with international best practice to a considerable extent also under the new regime, so that vaguely defined concepts will continue to play a role as benchmarks for firm behaviour. Moreover, the causality between specific acts or omissions on the one hand and specific disadvantages and/or losses caused to the detriment of stakeholders on the other hand will also continue to be difficult to establish, so that the existence of new enforcement regimes as such may have a limited impact.

If legal uncertainty regarding the substantive standards is at the heart of the problems diagnosed above, one potential reaction by corporate directors could well turn out to be deliberate attempts to influence the very standards they are expected to comply with. One possible avenue towards this could be the participation in

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[99] See, generally (discussing the respective functional characteristics within the context of corporate law), Binder, *supra* n. 42, at pp. 174-202.

[100] It is therefore hardly surprising that the introduction of section 172(1) of the UK Companies Act, which provides for a rather wider duty to take into account different stakeholder interests does not appear to have triggered meaningful changes in business decisions: cf. Grier, *supra* n. 38.

[101] *Supra* III. 2.

organised lobbying, including in self-regulatory organisations promoting the development of specific ESG standards. As has been observed elsewhere,[102] there is at least some evidence that industry organisations are already moving into this direction. While substantive outcomes remain difficult to assess also in this regard, there are reasons to doubt whether this should be welcomed: To be sure, self-regulation can provide a commendable, flexible, and effective alternative to state interference in circumstances where standardisation of market practices is required in order to rein in externalities. Generally speaking, self-regulation can be more beneficial than state regulation in such circumstances, in that it facilitates the development, and on-going improvement, bespoke solutions, based on the intimate knowledge of business practices and business needs and the swift and effective adaptation of relevant standards to changing circumstances. At first sight, given the dynamically emerging understanding of the implications of a wide range of different business activities on social or environmental stakeholder interests, these advantages could certainly commend self-regulation as an alternative in the area of CSR and ESG. However, while directors may be expected to have strong incentives to structure relevant standards in a way that maximises discretion and to reduce the risk of either liability or regulatory intervention, they are perhaps not the best guardians of relevant public interests in the first place.[103] And as actual preferences of investors with regard to ESG matters are difficult to determine and relevant parameters for regulating ESG-related decisions both difficult to calibrate and difficult to measure, it is indeed questionable whether a further standardisation of "best practice" through self-regulatory initiatives can be expected to yield meaningful results. As a result, self-regulatory initiatives, rather than promoting greater standardisation of best practice in a way that could actually enhance, and thus: leverage, investor-driven demand for more sustainable business initiatives, potentially could be exploited as a strategy to avoid *both* public regulation *and* the application of traditional restrictions on business decisions. While European law hardly can be said to have accomplished its objectives thus far, the fact that is has taken a sceptical stance with regard to self-regulation in the field, as such, thus does not come as a surprise.

V. CONCLUSIONS

As evidenced, not least, by a comparison between corresponding developments in the US on the one hand and the European Union on the other, convergence with regard to the promotion of CSR- or ESG-related matters in corporate laws on both

[102] E.g., Wolfgang Schön, '"Nachhaltigkeit" in der Unternehmensberichterstattung', ZfPW – Zeitschrift für die gesamte Privatrechtswissenschaft (2022), 208, at 240-1.
[103] E.g., Ferrarini, Siri and Zhu, *supra* n. 50, pp. 9-12.

sides of the Atlantic has taken place only in a rather superficial sense. While it has taken a decidedly regulatory form within the EU, regulatory intervention has not taken place in the US so far, leaving the relevant decisions mainly to corporations themselves – with (activist) shareholder initiatives as key drivers. Irrespective of this fundamental difference in context, the broader trend promoting positive directors' duties for the protection of stakeholder interests, that has been advocated both within the US and in Europe is inconsistent with both shareholder- and stakeholder-oriented corporate law doctrines: Addressing stakeholder concerns to the extent compatible with (long-term) profitability of firms has been consistent with "shareholder-oriented" regimes in the past, whereas even "stakeholder-oriented" doctrines traditionally have not gone as far as to recognise positive obligations in this respect. Specifically within the EU, the predominant regulatory strategy so far has aimed at the incentivisation of investors to exercise market pressure on corporate strategies and business decisions, and thus can be characterised as indirect and procedural in nature. However, in the absence of (a) standardised information that would allow for discrimination in investment patterns and (b) reliable empirical evidence as to investors' real preferences, the potential to accomplish objectives remains dubious: As it is unclear if (a) investors care at all and (b), even if they did care, could distinguish between different strategies on the basis of published information, expectations that investor preferences will ultimately trigger a move towards greater sustainability of business models and strategies may well prove premature and overly optimistic. In terms of substantive outcomes, the current and the incoming regulatory frameworks both fail to offer reliable and sufficient guidance for directors willing to comply and offer wide margins of discretion that could be exploited for manipulative ends. All in all, the resulting uncertainty and room for self-serving manoeuvre may well turn out to be outright counterproductive: While traditional barriers for corporate decisions inconsistent with the long-term profitability of the respective firm will be weakened, the risk of self-serving decisions, reflecting individual policy choices or outright egoistic management interests, is likely to increase. Substituting the (long-term) interest of the corporation with (potentially conflicting) stakeholder interests as the ultimate measure for corporate decision-making may thus do little to advance the latter – while coming with potentially damaging consequences for the former.